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Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

MICHAEL ROGERS and HULYA KAR,

Petitioners,

v.

ROYAL CARIBBEAN CRUISE LINES and the M/V MONARCH OF THE SEAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals for the Ninth Circuit erred in holding that the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United States and codified at 9 U.S.C. §§ 201 *et seq.* (1971), supersedes the mandatory jurisdiction conveyed to federal courts by Congress under the Seafarer's Wage Act, 46 U.S.C. § 10313(i) (1983), which had been recognized by existing precedent set by this Court and that of the Courts of Appeals for the Second, Third, Fourth, and Fifth Circuits.

(2) Whether Congress intended to supersede Title 9's definition of "commercial" found in Chapter 1, Section 1, which specifically excludes contracts of employment of seamen as being commercial, when enacting Chapter 2 of Title 9, which permits arbitration of international "commercial" disputes.

(3) If two federal laws conflict, such as Title 9, amended in 1971, with Title 46, amended in 1983, should courts continue to follow the "last-in-time" rule as to hold the more recent statute supersedes the former?

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OPINIONS BELOW

The opinions below are contained in the Appendices ("App.") to this Petition. The November 6, 2008 opinion of the U.S. Ninth Circuit Court of Appeals is reproduced at App. A, and reported at 547 F.3d 1148, 2008 A.M.C. 2752, 185 L.R.R.M. (BNA) 2263, 156 Lab.Cas. P. 35,505, 14 Wage & Hour Cas.2d (BNA) 336, 08 Cal. Daily Op. Serv. 13,895, 2008 Daily Journal D.A.R. 16,646 (9th Cir. 2008). The district court's unpublished order is reproduced at App. B. The Ninth Circuit's December 19, 2008 order denying rehearing and rehearing *en banc* is reproduced at App. C and has yet to appear in any official or unofficial reports.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on November 6, 2008 (App. A), and Petitioners' timely petition for rehearing and rehearing *en banc* was denied on December 19, 2008 (App. C), with only Judge Noonan opining the case should be reheard. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS

A. The Seafarers' Wage Act

The 1983 version of the Shipping Act, in particular Section 10313 known as the Seafarers' Wage Act, provides, in pertinent portions:

UNITED STATES CODE
TITLE 46. SHIPPING

§ 10313. Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

* * *

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the ***master or owner*** shall pay to the seaman 2 days' wages for each day payment is delayed.

* * *

(i) ***This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.***

(46 U.S.C. § 10313 (1983) (Emphasis added)).

B. The U.S. Arbitration Act

UNITED STATES CODE
TITLE 9. ARBITRATION

CHAPTER 1. GENERAL PROVISIONS

1. "Maritime transactions" and "commerce" defined; ***exceptions to operation of title***

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; ***"commerce", as herein defined***, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, ***but nothing herein contained shall apply to contracts of employment of seamen***, railroad

employees, ***or any other class of workers engaged in foreign or interstate commerce.***

(9 U.S.C. § 1 (1971) (Emphasis added)).

CHAPTER 2. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, ***which is considered as commercial***, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

* * *

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

(9 U.S.C. § 208 (1971) (Emphasis added)).

C. The Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, implemented in the United States by Act of Congress and codified at 9 U.S.C. §§ 201-208, *supra,* provides in pertinent portion:

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

* * *

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties

to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article V

* * *

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

STATEMENT OF THE CASE

Petitioners filed this action in the U.S. District Court for the Central District of California against Respondents, namely shipowner Royal Caribbean Cruise Lines, *in personam*, and the vessel, M/V MONARCH OF THE SEAS, *in rem*, seeking to recover for unlawful deductions from their wages made at the port of Los Angeles and other U.S. ports. The district court agreed it had proper admiralty jurisdiction over Petitioners' claims pursuant to 28 U.S.C. § 1333. (App. 7, fn 5).

As summarized by the appellate court, Petitioner Michael Rogers, a citizen of Trinidad and Tobago, and Petitioner Hulya Kar, a citizen of Turkey, worked on cruise ships operated by Royal Caribbean Cruises Ltd. ("Royal Caribbean"). (See App. 2). Rogers worked as a "cabin boy" and "stateroom attendant," and Kar worked as an assistant waiter. (*Id.*).

Rogers and Kar stipulated that each signed a written employment agreement with Royal Caribbean. The employment agreement expressly stated:

> "I . . . understand and agree that the Collective Bargaining Agreement between [Royal Caribbean] and the [Norwegian Seafarers'] Union is incorporated into and made part of this Employment Agreement and that I and the Company are bound by its terms and conditions."

(App. 3).

Article 26 of the Collective Bargaining Agreement between Royal Caribbean and the Norwegian Seafarers' Union ("the Union") describes a "Grievance and Dispute Resolution Procedure." Subsection (d) states that if a grievance or other dispute "relating to or in any way connected with the seafarer's service for" Royal Caribbean is "not resolved by the Union, the Owners/Company, and/or the Seafarer," then the dispute shall be referred to and resolved exclusively by binding arbitration pursuant to the United Nations Conventions on Recognition and Enforcement of

Foreign Arbitral Awards (New York 1958), 21 U.S.T. 2517, 330 U.N.T.S. ("The Convention"). (App. 3-4).

Respondent Royal Caribbean moved to compel arbitration of the Petitioners' action, citing the arbitration provision contained in the collective bargaining agreement incorporated by reference into the Petitioners' employment contract. (App. 4). Instead of staying the matter pending arbitration, the district court granted the motion and dismissed the action with prejudice. (*Id.*).

Petitioners timely appealed the order of dismissal to the Court of Appeals for the Ninth Circuit, which affirmed the order of dismissal with an opinion. (See App. A). The Ninth Circuit denied Petitioners' timely motions for rehearing and rehearing *en banc* on December 19, 2008 as set forth above (see App. C), and Petitioners now file this Petition seeking certiorari review by this Court.

ARGUMENT

A. Review is Required to Reconcile Conflicting Circuit Opinions and Existing Precedent Conferring Mandatory Jurisdiction to Federal Courts under the Seafarers' Wage Act.

The Petition seeking review should be granted because the decision by the United States Court of Appeals for the Ninth Circuit is in conflict with the terms and purposes of Seafarers' Wage Act and prior decisions of the Second, Third, Fourth, and Fifth

Circuits on the important issue of mandatory jurisdiction conveyed by Congress to the federal courts over seafarer wage disputes. See 46 U.S.C. § 10313(i) ("The courts are available to the seaman for the enforcement of this section."); *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568, 573 (2nd Cir. 1960); *Velidor v. L/P/G Benghazi,* 653 F.2d 812 (3rd Cir. 1981); *Lakos v. Saliaris*, 116 F.2d 440 (4th Cir. 1940); *Castillo v. Spiliada Maritime Corporation*, 937 F.2d 240, 243 (5th Cir. 1991). The decision also departs from the views expressed by this Court and past precedent set forth in the Ninth Circuit, itself, that courts are available to decide Wage Act disputes while the seafarer and ship is the forum. See *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971); *Larkins v. Waterways Corp.*, 640 F.2d 997, 999 (9th Cir. 1981); *Su v. M/V SOUTHERN ASTER*, 978 F.2d 462, 465 (9th Cir. 1992). See also *Mateo v. M/S KISO,* 805 F. Supp. 761, 777 (N.D. Cal. 1991); *Lombard v. Sealand,* 1989 A.M.C. 965 (W.D. Wash. 1988); *Mihalinos v. Liberian S.S. TRIKALA*, 1972 A.M.C. 726 (S.D. Cal. 1972); *The PROHOVA*, 38 F. Supp. 227, 228 (S.D. Cal. 1941).

Until recently, mandatory jurisdiction under the Wage Act was widely held to be the "law in virtually every circuit of the United States." *M/V FAREAST TRADER*, 1989 A.M.C. 2721, 1989 WL 201605 (S.D. Tex. 1989) *citing Abraham v. Universal Glow*, 681 F.2d 451 (5th Cir. 1982). However, the Ninth Circuit's decision in this case adopts the view of the Court of Appeals for the Eleventh Circuit in *Lobo v. Celebrity*

Cruises, Inc., 488 F.3d 891 (11th Cir.), *rehearing en banc denied*, 255 Fed. Appx. 498 (11th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1085, 169 L.Ed.2d 810 (2008). Both circuits disregard the plain meaning of the statutes and their underlying purposes. (See App. 16-17). For no compelling reason, they found that Chapter 2 of Title 9 enacted in 1971 overcomes Congress' more recent direction in Section 10313(i) of Title 46 as amended in 1983. Left uncorrected, this will quickly expand to lead other courts to make arbitrary decisions as to what law controls.

B. Review is needed to Clarify that Title 9 Does Not Permit Arbitration of Seafarer Employment Disputes As They Are Excluded Under Title 9's Definition of "Commercial."

Seafarers have long been regarded as a protected class, each seaman shielded by our admiralty courts as their wards. See *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962) *citing Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823). It is well established that a seamen's contractual obligation to arbitrate wage claims with his employer cannot abrogate his statutory right to resolve wage claims under the applicable statutory rules with the shipowner or against the vessel in federal court. *Mateo v. M/S KISO*, 805 F. Supp. 761, 777 (N.D. Cal. 1991) (*citing Arguelles, supra*, 400 U.S. at 357-58). See also *Avgoustis v. Erini Shipping Co.*, 177 F.2d 461, 462 (2nd Cir. 1949). To avoid employment terms, the Wage Act, itself, is directed at the ship's master or

the shipowner, not the employer. See 46 U.S.C. § 10313(g) ("the ***master or owner*** shall pay to the seaman 2 days' wages for each day payment is delayed."). The Ninth Circuit recognized these principles and policies, noting their importance as part of federal maritime law. (See App. 6-9).

The Ninth Circuit erred when it departed from precedent and the provisions of Article V of the Convention, which requires courts to deem invalid an arbitration clause if ***"it concerns a subject matter which is 'not capable of settlement by arbitration under the law of that country.'"*** *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 659, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (citation omitted) (emphasis added). In that regard, seafarer disputes are matters that Title 9, in addition to general maritime law, specifically excludes as being capable of arbitration under our laws. See 9 U.S.C. § 1. Even the Ninth Circuit had to acknowledge that the seafarer exemption under Section 1 of Title 9 means "the FAA does not apply to them." (App. 24-28).

His Honor, Judge Noonan in dissenting in *Rogers*, *supra*, expressed far better than the undersigned counsel ever could, key reasons why the majority was incorrect to hold that the arbitration agreement between the seafarers' union and employer was unenforceable to divest seafarers of their statutory rights against the shipowner and vessel arising from their failing to be paid all their wages in Los Angeles. (See App. 24-33). After providing a brief but

compelling historical account of the Wage Act, Judge Noonan explains in his dissent in this case:

> The drift of Royal Caribbean's argument is now evident: . . . By contract Kar has no choice but to arbitrate.
>
> What's wrong with this argument? It assumes that the rights conferred on seaman by U.S.C. § 10313 may be waived by contract. The assumption runs counter to general maritime law. . . . The shipowner who relies on a seaman's release of his rights must show "that it was executed freely, without deception or coercion and that it was made by the seaman with full understanding of his rights."
>
> In our case, Kar has stipulated that she signed the Sign-On Agreement which incorporated the CBA. She has not stipulated that she saw the CBA, read it, or understood it, or that her attention was drawn to the federal rights she was waiving. . . . In the absence of any stipulation or other evidence, the incorporation of the arbitration clause into the Sign-On Agreement was void.
>
> Royal Caribbean attempts to avoid this conclusion by this line of argument: The Convention, admittedly not self executing, has been enacted into federal law by 9 U.S.C. § 202. This statute commands the federal courts to enforce all international agreements to arbitrate, no exceptions admitted. It is Royal Caribbean's position that it is this statute, not Kar's Sign-On Agreement that

puts a dent or, rather, a hole in 46 U.S.C. § 10313's set of rights and remedies.

This contention is a slight of hand. The statute enforcing the Convention comes into play only if there is a valid agreement to arbitrate. We have already determined that no such agreement exists. The international arbitration statute has not been set in motion.

And even if it were, what rule of construction would tell us that the statute, enacted in 1971, trumps a statute that long preceded it and was amended and codified in the 1980's? To suppose that Congress in 1971 meant to repudiate a role for federal courts that went back to 1790 – and did so without a single explicit word – is to engage in unlikely fantasy. To suppose that Congress in the 1980's kept alive a statute expressly opening the federal courts to foreign seamen when the alleged sense of the 1971 statute mandated arbitration in their place is to credit Congress with absentmindedness and to fail to acknowledge the later statute as the governing statute.

. . . No more than the Court in the *Arguelles* case should we do what Congress did not do and proclaim the elimination of the statutory remedy for foreign seamen. Congress has chosen to set in place two routes for the seaman, including the foreign seaman. He or she may arbitrate or he or she may proceed

> without paying costs to sue in a federal district court.

(Noonan, J., dissenting (citations omitted) (App. 30-33).

Furthermore, the Courts of Appeals for the Ninth Circuit as well as the Eleventh, in this case and in *Lobo, supra,* misinterpreted the relationship between Chapters 1 & 2 of the U.S. Arbitration Act, 9 U.S.C. § 1, *et seq.,* in a manner which does not comport with the statutory analysis rule recently enunciated by this Court in *Fla. Dept. of Revenue v. Picadilly Cafeterias, Inc.*, ___ U.S. ___, 128 S.Ct. 2326, 2336, 171 L.Ed.2d 203 (2008). In this case, the appellate court found the exemption clause in Section 1 "does not affect the definition of commerce," despite its heading and its terms. (App. 15).

Section 1 of Title 9 provides two definitions used in the title, namely "maritime transactions" and "commerce." See 9 U.S.C. § 1. These definitions are contained in the section separated by a semi-colon. As to the latter definition following the semi-colon, Section 1 states in relevant part that "'commerce' as herein defined, means commerce among the several States or with foreign nations. . . ." *Id.* The exemption clause finishes the definition of "commerce," including that commerce with foreign nations, does not include contracts of employment of seamen. It states "but nothing herein [Title 9] contained shall apply to contracts of employment of seamen . . . or any other class of workers engaged in *foreign* or interstate

commerce." *Id.* (Emphasis added). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (rejecting argument to limit Section 1 as not to apply to Section 2).

Not only does the title of Section 1 "Exceptions to Operation of Title" indicate Congress' intent to apply this definition to all of Title 9, but also the fact that Section 1 deals with contracts of employment of seamen and other workers engaged in foreign commerce. Had Congress intended Section 1's definitions to apply only to Chapter 1 or domestic interstate commerce, it would not have used the broad description for the title nor the term that the definitions were to apply to foreign commerce.

As one commentator recently noted with respect to ignoring the title of Chapter 1 as well as Section 1's terms, "such an assumption becomes untenable in light of the fact that when Congress amended the FAA to include the N.Y. Convention Act, it also revised the title of chapter 1 to 'General Provisions,' which is a revision only interpretable as applying to all subsequent chapters – otherwise there would have been no need to insert such a title." Jarred Pinkston, *Note and Comment: New York's Unwelcoming Harbor: The New York Convention's Inapplicability to Claims Arising from Seamen's Employment*, 3 BYU INT'L L. & MGMT. REV. 233, 234 (2007); see also Matthew Nickerson, *Closing U.S. Courts to Foreign Seamen: The Judicial Excision of the FAA Seamen's Arbitration Exception from the New York Convention Act*, 41 TEX. INT'L L.J. 103 (2006).

The Ninth Circuit's opinion ignores hundreds of years of precedent granting seafarers access to federal courts as determined by four other circuit courts and completely disregards Congress' own labeling and terms of how to apply Chapter 1 and Section 1's definitions to all of Title 9. Accordingly, Petitioners seek review for the Court to examine whether Congress intended to jettison away such precedent and its own statutory language protecting seafarers by giving them immediate access to the courts where they land without saying it was doing so when adopting the Convention intended to resolve international business disputes by arbitration.

C. Review Is Sought to Affirm the "Last-in-Time" Rule in Resolving Conflicts Between Treaties and Federal Statutes.

In addition to resolving the conflict among the circuit courts as to interpretation of the Wage Act's mandatory grant of jurisdiction, the Petition should also be granted so as to address the important issue of what law controls as between a treaty and subsequent federal statute. Although it makes federal law superior to inconsistent state law, the Supremacy Clause of the Constitution does not resolve the relative hierarchy among the different categories of federal law, be it federal statutes or treaties.

Traditionally, conflicts between two federal laws are resolved by the "last-in-time" rule, under which the more recent of the two supersedes the prior inconsistent law. See, e.g., *Whitney v. Robertson*, 124

U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888) (reasoning that when a treaty and federal statute conflict, "the one last in date will control the other."); see also *Lakos, supra,* 116 F.2d at 444 ("it is well settled that the provisions of a statute supersede those of a prior treaty inconsistent therewith."). The Court should hear the petition so as to resolve whether the 1983 amendment to the Wage Act controls over the earlier 1971 adoption of the Convention. See Lawrence W. Kaye, *A Ripple on the Waters That May Turn the Tide in Favor of Arbitrating Passenger Claims,* 17 U.S.F. Mar. L.J. 287, 298 (2005) (noting amendments to the Wage Act "represent the last expression of the sovereign will in the United States" and that subsequent "amendments consistently express a claimant's right to proceed before a court, not before an arbitrator."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

**United States Court of Appeals,
Ninth Circuit.**

Michael ROGERS; Hulya Kar, individually and on behalf of all other similarly situated seafarers and as private attorney general,
Plaintiffs-Appellants,
v.
ROYAL CARIBBEAN CRUISE LINE; M/V Monarch of the Seas,
Defendants-Appellees.

No. 07-55071.

Argued and Submitted May 5, 2008.
Filed Nov. 6, 2008.

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Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CV-06-04574-SVW.

Before: JOHN T. NOONAN, W. FLETCHER, and RONALD M. GOULD, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge:

Michael Rogers and Hulya Kar appeal the district court's order granting their employer's motion to compel arbitration. They argue that federal statutes exempt their employment contracts from the scope of Title 9 of the United States Code. We conclude that their employment contracts are "considered as commercial" under Title 9. Therefore, we hold that the arbitration provisions contained in their employment contracts are enforceable, and we affirm the judgment of the district court.

I. Background

Michael Rogers, a citizen of Trinidad and Tobago, and Hulya Kar, a citizen of Turkey, worked on cruise ships operated by Royal Caribbean Cruises Ltd. ("Royal Caribbean").[1] Rogers worked as a "cabin boy" and "stateroom attendant," and Kar worked as an assistant waiter.

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[1] Royal Caribbean is unable to identify records for any employee named Michael Rogers. For purposes of this opinion, we assume, without deciding, that Rogers was a Royal Caribbean employee. Rogers has stipulated that he signed an employment agreement incorporating the arbitration clause at issue in this case.

Counsel for Rogers and Kar have stipulated that both employees signed a written employment agreement with Royal Caribbean. Kar's employment agreement provided that Royal Caribbean would pay her $50 in "[m]onthly basic pay," and that she was entitled to $890 in "[m]onthly [g]uaranteed [p]ay including [g]uaranteed [o]vertime." According to the employment agreement, "the monthly guaranteed pay is inclusive of all gratuities provided by passengers."

Kar's employment agreement expressly stated: "I . . . understand and agree that the Collective Bargaining Agreement between [Royal Caribbean] and the [Norwegian Seafarers'] Union is incorporated into and made part of this Employment Agreement and that I and the Company are bound by its terms and conditions." In the employment agreement, Kar acknowledged having received a copy of the Collective Bargaining Agreement.

Article 26 of the Collective Bargaining Agreement between Royal Caribbean and the Norwegian Seafarers' Union ("the Union") describes a "Grievance and Dispute Resolution Procedure." Subsection (d) states that if a grievance or other dispute "relating to or in any way connected with the seafarer's service for" Royal Caribbean is "not resolved by the Union, the Owners/Company, and/or the Seafarer," then the dispute

> shall be referred to and resolved exclusively by binding arbitration pursuant to the United Nations Conventions on Recognition

> and Enforcement of Foreign Arbitral Awards (New York 1958), 21 U.S.T. 2517, 330 U.N.T.S. ("The Convention"). . . . The arbitration referred to in this Article is exclusive and mandatory. Claims and lawsuits may not be brought by any Seafarer or party hereto, except to enforce arbitration or a decision of the arbitrator.

On July 21, 2006, Rogers and Kar brought suit against Royal Caribbean in the U.S. District Court for the Central District of California. The complaint alleged that Royal Caribbean had not paid them "their full wages, including tips, overtime and other compensation, owed under their contracts and/or in accordance with applicable general maritime law as well as California law." The complaint further alleged that Royal Caribbean did not pay Rogers and Kar their full wages within twenty-four hours of the end of each voyage, thereby violating 46 U.S.C. § 10313(f).

On October 13, 2006, Royal Caribbean filed a motion to compel arbitration in accordance with the terms of the employment contract and the collective bargaining agreement. In a hearing on December 11, 2006, the district court granted the motion from the bench. On January 25, 2007, the district court issued a written order granting the motion to compel and dismissing the complaint with prejudice. Rogers and Kar timely appealed.

II. Standard of Review

We review de novo the district court's order granting the defendant's motion to compel arbitration. *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir.2007); *see also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir.2006) ("The validity and scope of an arbitration clause are reviewed de novo. Whether a party has waived the right to sue by agreeing to arbitrate is reviewed de novo."). We also review de novo the district court's interpretation of statutes, as well as its interpretation of treaties to which the United States is a party. *Continental Ins. Co. v. Fed. Express Corp.*, 454 F.3d 951, 954 (9th Cir.2006); *Holder v. Holder*, 305 F.3d 854, 863 (9th Cir.2002). "The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).

III. Discussion

The question in this case is whether the employment agreement's provision for exclusive and mandatory arbitration is enforceable. We hold that it is, and we therefore affirm the judgment of the district court.

A. History of Statutory Protections for Seafarers' Wages

Congress first enacted laws to protect the wages of seafaring employees in 1790. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572-73, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982). Congress subsequently codified those laws at 46 U.S.C. §§ 596-597. In 1983, Congress altered those statutes slightly and recodified them at 46 U.S.C. § 10313. Act to Revise, Consolidate, and Enact Certain Laws Related to Vessels and Seamen, Pub.L. No. 98-89 ch. 103, 97 Stat. 500 (1983).

As the Supreme Court noted in 1932, "[t]he policy of Congress, as evidenced by its legislation, has been to deal with [seafarers] as a favored class." *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282, 53 S.Ct. 159, 77 L.Ed. 302 (1932). In *U.S. Bulk Carriers, Inc. v. Arguelles,* the Court observed:

> Seamen from the start were wards of admiralty. In 1872 it was provided that the federal courts might appoint shipping commissioners to superintend the shipping and discharge of seamen in our merchant fleet. Commissioners indeed served as an administrative adjunct of the federal courts until July 16, 1946, when § 104 of Reorganization Plan No. 3 of 1946 abolished them. No other administrative agency was substituted. The federal courts remained as the guardians of seamen, the agencies chosen by Congress, to enforce their rights – a guardian concept which, so far as wage claims are

> concerned, is not much different from what it was in the 18th century.

400 U.S. 351, 355, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971) (citations and internal quotation marks omitted).

In *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240, 243 (5th Cir.1991), the Fifth Circuit explained the rationale for Congress' decision to afford special statutory status to seafarers and their wage claims:

> They enjoy this status because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and terms of employment.

To shield shipmen against unfair conduct by shipowners, Congress enacted special wage protection statutes.

Those special wage protection statutes include the provisions now codified at 46 U.S.C. § 10313.

Subsection (f) of Section 10313 states that "[a]t the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier." Subsection (g) states that "[w]hen payment is not made as provided under subsection (f) of this

section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed." Subsection (i) states that "[t]his section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section."

In interpreting an earlier version of these statutes, the Supreme Court explained the purpose of the provision making the courts "available to the seaman for the enforcement" of the wage provisions (now 46 U.S.C. § 10313(i)):

> The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen for they had the right independently of this statute to seek redress in the courts of the United States, and if it were the intention of Congress to limit the

> provision of the act to American seamen, this feature would have been wholly superfluous.

Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 354, 40 S.Ct. 350, 64 L.Ed. 607 (1920).

B. Codification of the Arbitration Convention

Federal arbitration law is codified in the three chapters of Title 9 of the United States Code. The Federal Arbitration Act ("FAA"), enacted in 1947, comprises the first chapter. *See* 9 U.S.C. §§ 1-14. The "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," implementing the treaty of the same name, was enacted in 1970. This statute, commonly called the Convention Act, comprises the second chapter. *See* 9 U.S.C. §§ 201-208. The third chapter, implementing the Inter American Convention on International Commercial Arbitration, is not relevant to this case. *See* 9 U.S.C. §§ 301-307.

Section 1 of the FAA includes a special carve-out for "contracts of employment of seamen." 9 U.S.C. § 1. Section 1 is entitled "'Maritime transactions' and 'commerce' defined; exceptions to operation of title." It states:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of

> controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*

9 U.S.C. § 1 (emphasis added).

For purposes of our analysis, we refer to the italicized language in Section 1 as the "exemption clause." *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 112, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). The Supreme Court has interpreted the language of the exemption clause narrowly. In *Circuit City Stores, Inc. v. Adams,* the Court held that the Section 1 exemption from the FAA extends only to "contracts of employment of transportation workers." 532 U.S. at 119, 121 S.Ct. 1302.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") entered into force for the United States on December 29, 1970. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S.

38 ("New York Convention"). Article II(1) of the Convention provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Paragraph 3 of Article I of the Convention allows – but does not require – a Contracting State to "declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are *considered as commercial* under the national law of the State making such declaration." *Id.* art. I(3) (emphasis added).

In accordance with Paragraph 3, the United States declared in the Convention Act that it would apply the Convention only to "legal relationships . . . considered as commercial." Section 202 of the Convention Act provides that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. Section 2 of the FAA, referenced in Section 202, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to

> perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 206 of the Convention Act states that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206. The Convention Act includes a general provision incorporating the FAA. Section 208 of the Act states that "Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208.

C. Analysis

1. The Exemption Clause of the FAA

We must decide whether the exemption clause in Section 1 of the FAA applies to arbitration agreements that would, in the absence of the exemption clause, be covered by the Convention Act. We hold that it does not.

As noted above, the Convention Act applies to arbitration agreements arising out of legal relationships that are "considered as commercial." 9 U.S.C. § 202. The Convention Act states that such agreements include, but are not limited to, agreements described in Section 2 of the FAA. Section 2 describes provisions in contracts "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2. The Supreme Court has concluded that contracts "evidencing a transaction involving . . . commerce" include employment contracts. *Circuit City Stores*, 532 U.S. at 113, 121 S.Ct. 1302.

The Supreme Court considered the scope of Section 2 in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). The Court had previously concluded that the FAA preempts state law, and in *Allied-Bruce* it considered the breadth of the FAA's reach, as set forth in Section 2. *Id.* at 272-73, 115 S.Ct. 834. The Court examined the phrase "a contract evidencing a transaction involving commerce" in two steps. First, the Court noted that the words "'involving commerce' . . . are broader than the often-found words of art 'in commerce.'" *Id.* at 273, 115 S.Ct. 834. The Court held that the phrase "involving commerce" is "the functional equivalent of" the phrase "affecting commerce," which "normally signals Congress' intent to exercise its Commerce Clause powers to the full." *Id.* at 273-74, 115 S.Ct. 834. Second, the Court considered the language "evidencing a transaction" involving

commerce. *Id.* at 277, 115 S.Ct. 834. The Court read this phrase broadly, holding that the transaction must involve interstate commerce, but that the parties to the transaction need not have contemplated that the transaction had an interstate commerce connection. *Id.* at 281, 115 S.Ct. 834.

The Court noted in passing in *Allied-Bruce* that Section 1 of the FAA "defin[ed] the word 'commerce' in the language of the Commerce Clause itself." 513 U.S. at 274, 115 S.Ct. 834; *see* 9 U.S.C. § 1 ("'[C]ommerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation[.]"). The Court made no reference to the exemption clause when it noted the definition of commerce in Section 1.

The exemption clause in Section 1 is neither part of the definition of commerce in Section 1, nor a limitation on which relationships are "considered as commercial" pursuant to Section 2. Rather, it operates as an exemption. In other words, the exemption clause does not state that transportation workers are *not* engaged in commerce or that their employment contracts are not "considered as commercial." Instead, it states that *even though* such workers are engaged in commerce and *even though* their employment contracts are considered as commercial, the FAA does not apply to them.

Because the exemption clause does not affect the definition of "commerce" or the statutory description of which relationships are "considered as commercial," the exemption is not incorporated into the Convention Act by virtue of Section 202. The only limitation placed on the scope of the Convention Act, other than the language of the Convention itself, is the limitation in Section 202 that "[a]n arbitration agreement . . . arising out of a legal relationship . . . which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the convention." 9 U.S.C. § 202. The employment contracts of seafarers "aris[e] out of legal relationship[s] . . . which [are] considered as commercial," and therefore those contracts "fall[ ] under the [C]onvention."

The exemption clause is also not incorporated into the Convention Act by Section 208. That section incorporates the provisions of the FAA unless they are "in conflict with" either the Convention Act or the Convention. *See* 9 U.S.C. § 208 ("Chapter 1 [*i.e.*, the FAA] applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."). The only mechanism the Convention provides for limiting applicability of the Convention is the opportunity for Contracting States to declare that the Convention applies "only to differences arising out of legal relationships . . . which are considered as commercial under the national law of the State making such declaration." New York

Convention art. I(3). Congress' declaration to that effect, as codified in Section 202 of the Convention Act, did not include the exemption clause. The Convention Act does not allow the exemption clause to operate as an additional limitation, over and above Section 202, on the applicability of the Convention. Nor, indeed, does the exemption clause purport to be such an additional limitation, for it does not narrow the definition of "commercial." Rather, as emphasized above, the exemption clause specifies that the FAA does not apply to contracts within the scope of the clause even though such contracts are commercial.

2. 46 U.S.C. § 10313

Rogers and Kar argue that *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971), prohibits arbitration agreements from divesting courts of jurisdiction over seafarer wage disputes brought under 46 U.S.C. § 10313. Section 10313 contains various provisions guaranteeing wages to seafarers. Section 10313(i) specifically provides that "[t]he courts are available to the seamen for enforcement of this section." The Fifth and Eleventh Circuits have previously held, as we do today, that the exemption clause of Section 1 does not apply to the Convention Act, but those cases did not involve claims for lost wages under Section 10313. *See Bautista v. Star Cruises,* 396 F.3d 1289, 1298-1300 (11th Cir.2005); *Francisco v. STOLT ACHIEVEMENT MT,* 293 F.3d 270, 274-76 (5th Cir.2002). However, in *Lobo v. Celebrity Cruises, Inc.,* 488 F.3d

891, 896 (11th Cir.2007), the Eleventh Circuit has recently extended its holding in *Bautista* to a claim for lost wages under Section 10313. *Id.* at 896. We join the Eleventh Circuit in concluding that the Convention Act overcomes any presumption deriving from Section 10313(i) that the courts shall remain open to foreign seafarers in a case in which a seafarer has signed an otherwise enforceable agreement to arbitrate a wage claim.[2]

We do not believe that the Supreme Court's decision in *Arguelles* requires us to hold otherwise. In *Arguelles,* the Court considered whether Section 301 of the Labor Management Relations Act ("LMRA") abrogated the federal court jurisdiction authorized by the predecessor to 46 U.S.C. § 10313. The Court held that it did not. The Court's decision was published just weeks after the Convention entered into force in the United States, and there is no indication that the

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[2] Section 10317 renders void any stipulation in an agreement purporting to deprive a seafarer of a remedy to which the seafarer otherwise would be entitled. 46 U.S.C. § 10317 ("A . . . seaman by any agreement . . . may not . . . be deprived of a remedy to which the . . . seaman otherwise would be entitled for the recovery of wages. A stipulation in an agreement inconsistent with this chapter . . . is void."). Because Rogers and Kar have not been deprived of any statutory remedy, we do not reach the question of whether Article V(1)(a) of the Convention would allow our courts to refuse to recognize and enforce an arbitral award effectuating such a deprivation. *See* New York Convention art. V(1)(a) ("Recognition and enforcement of the [arbitral] award may be refused . . . if . . . the said agreement is not valid under the law to which the parties have subjected it[.]").

Court considered the effect of the Convention on Section 10313. Nonetheless, the Court's analysis is instructive.

Section 301 of the LMRA provides that federal courts have subject matter jurisdiction over "actions and proceedings by or against labor organizations." 29 U.S.C. § 185(c). It further provides that "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." *Id.* § 185(a). The question before the Court was whether an arbitration provision in a collective bargaining agreement took precedence over the predecessor to Section 10313.

Despite the fact that the Court had previously held that Section 301 of the LMRA gave it the authority to develop a federal common law of collective bargaining agreements, *see Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), the Court in *Arguelles* deferred to Congress' statutory resolution of the question. After observing that federal courts remain "the guardians of seamen," particularly with respect to wage claims, the Court wrote that it could "find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to take the place of the old shipping commissioners or to assume part or all of the roles

served by the federal courts protective of the rights of seamen since 1790." *Arguelles,* 400 U.S. at 355-56, 91 S.Ct. 409. The Court wrote:

> We do not hold that [Section 10313] is the exclusive remedy of the seaman. He may, if he chooses, use the processes of grievance and arbitration. Yet, unlike Congress, we are not in a position to say that his interest usually will be best served through § 301 rather than through [Section 10313].
>
> The literal conflict between this ancient seaman's statute and the relatively new grievance procedure is one which we think Congress rather than this Court should resolve. We do not sit as a legislative committee of revision. We know that this employee has a justiciable claim. We know it is the kind of claim that is grist for the judicial mill. We know that in [Section 10313] Congress allowed it to be recoverable when made to a court. We know that this District Court has the case properly before it under the head of maritime jurisdiction. We hesitate to route this claimant through the relatively new administrative remedy of the collective agreement and shut the courthouse door on him when Congress, since 1790, has said that it is open to members of his class.
>
> . . .
>
> The chronology of the two statutes – [Section 10313] and § 301 – makes clear that the judicial remedy was made explicit in [Section

> 10313] and was not clearly taken away by § 301. What Congress has plainly granted we hesitate to deny. Since the history of § 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require *much more* to hold that § 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedy provided by 46 U.S.C. [§ 10313].

Id. at 356-58, 91 S.Ct. 409 (emphasis added).

As the Eleventh Circuit concluded in *Lobo,* Congress has provided "much more" in the text of the Convention Act than it provided in Section 301 of the LMRA. 488 F.3d at 895. As that court explained:

> The Court's rationale [in *Arguelles*] was clear: the LMRA simply addressed restrictions on the activities of labor unions; since the history of the LMRA "is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them." [400 U.S.] at 357 [91 S.Ct. 409]. The Court concluded that it "would require much more to hold that § 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedy provided by 46 U.S.C. § [10313]." *Id.* at 357-58 [91 S.Ct. 409].
>
> In contrast, in ratifying the Convention, Congress explicitly agreed to "recognize an agreement in writing under which the parties undertake to submit to arbitration all

> or any differences which have arisen . . . between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Convention, Article II(1). Indeed, the Convention *compels* federal courts to direct qualifying disputes to arbitration, while the Supreme Court found the LMRA to be silent on this matter.

Lobo, 488 F.3d at 895.

We agree with the analysis of the Eleventh Circuit. The Convention Act specifically and expressly compels federal courts to enforce arbitration agreements. Therefore, *Arguelles* does not alter our conclusion that the exemption clause does not apply to the Convention Act.

3. The Arbitration Provisions are Enforceable Under the Convention

The Convention allows a party to avoid arbitration if the agreement to arbitrate is "null and void." New York Convention art. II(3). Rogers and Kar argue that even if the exemption clause does not apply to the Convention Act, and even if the Convention Act applies to seafarers' wage claims despite Section 10313, the arbitration provisions in the Collective Bargaining Agreement are unenforceable under the Convention because they are unconscionable and contrary to public policy. We address these arguments in turn.

a. Unconscionability

Even assuming that unconscionability renders an agreement "null and void" under the Convention, *see Bautista,* 396 F.3d at 1301, Rogers and Kar have not carried their burden of establishing that the arbitration clause at issue in this case is unconscionable. *See Paulson v. Dean Witter Reynolds, Inc.,* 905 F.2d 1251, 1255 (9th Cir.1990). The Collective Bargaining Agreement provides that the agreement is governed by "the laws of the State of Florida, United States of America." Florida law recognizes "a two-pronged approach" to unconscionability: procedural unconscionability and substantive unconscionability. *Belcher v. Kier,* 558 So.2d 1039, 1040 (Fla.Dist.Ct.App.1990). Procedural unconscionability is present where one party to an agreement has no meaningful choice but to accept the agreement. *See id.* at 1042. Substantive unconscionability is present where the terms of the agreement are not merely unreasonable, but shock the judicial conscience. *Id.* at 1043-44.

Rogers and Kar have not met their burden of establishing procedural unconscionability. The Collective Bargaining Agreement, including the arbitration provision, was the product of negotiations between Royal Caribbean and the union that represents Rogers and Kar. Rogers and Kar have presented no evidence that their union lacked any meaningful choice but to accept the arbitration provision. They have also presented no evidence that they themselves lacked any meaningful choice but to accept the

employment agreement that incorporated the Collective Bargaining Agreement.

Rogers and Kar have not met their burden of establishing substantive unconscionability. First, they argue that the arbitration provision does not allow the employees to participate in selecting the arbitrators. However, the Union participates in the selection process and can represent the interests of its members. Second, they argue that the arbitration provisions are substantively unconscionable because they require employees to travel to "distant fora" to resolve their disputes. However, the default location for arbitration is the country of citizenship of the employee. Rogers and Kar have not shown that either term is substantively unconscionable.

b. Contrary to Public Policy

Rogers and Kar further argue that the arbitration provision is invalid because it is contrary to public policy and therefore null and void. *See* New York Convention art. II(3). They argue that because seafarers are "wards of admiralty," *Arguelles,* 400 U.S. at 355, 91 S.Ct. 409, public policy requires that the courts remain open to seafarers for the enforcement of their wage claims. This argument is insufficient to warrant rendering the arbitration provisions void. Congress has expressly directed courts to ensure that arbitration agreements are enforced. 9 U.S.C. §§ 3, 206. The Supreme Court has recognized "the emphatic federal policy in favor of arbitral dispute

resolution," a policy which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). We have recognized "the strong public policy favoring arbitration," including international arbitration. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 726 (9th Cir.2007); *Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir.1992). Rogers and Kar have not shown that any public policy favoring seafarers is sufficient to overcome the public policy favoring international arbitration, particularly in the absence of any evidence that international arbitration would nullify any of the statutory rights Congress has conferred on seafarers.

IV. Conclusion

For the foregoing reasons, we conclude that the arbitration agreement between Royal Caribbean and the Norwegian Seafarers' Union is enforceable under the Convention.

AFFIRMED.

NOONAN, Circuit Judge, dissenting:

Among the statutes enacted by the First Congress was the Act of July 20, 1790 establishing a seaman's right to the prompt payment of his wages and a remedy for this right in federal court. 1 Stat. 133. No other class of contracts was so marked off. No

other class of potential plaintiffs was provided with a timetable in terms of which the debt owed them had to be paid.

Seamen's wages were bound by law to the ship the seamen sailed. A lien on the vessel for their payment was "so sacred" that "it adheres to the last plank of the ship." *Sheppard v. Taylor,* 30 U.S. 675, 710, 5 Pet. 675, 8 L.Ed. 269 (1831) (per Story, J.). The connection of ship and wages due was such that it could be said that a seaman's wages "are nailed to the ship." *The Eclipse,* 53 F. 273, 277 (N.D.Cal.1892).

This extraordinary solicitude for seamen – this linkage of seamen and ship and federal supervision – was not the product of a romantic vision of life at sea, but came from a grasp of its grim realities: the resources, social status, and bargaining position of the vessel owner set over against the paltry options of the individual seaman. Together with that appreciation of the seaman's lot went a sense of the importance of a merchant marine and its sailors to the economy of the nation and to its defense. The classic expression of the convergence of all these interests in federal solicitude for the seaman is the opinion of Justice Story, a native of the port of Salem, as he sat on circuit in Maine. *Harden v. Gordon,* 11 F. Cas. 480 (C.C.D.Me.1823). The continuing strength of this convergence was confirmed by the Supreme Court's citation and quotation of *Harden* in *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

In time the protection of federal law was extended by statute to foreign seamen whose ships were in American ports. *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348, 354, 40 S.Ct. 350, 64 L.Ed. 607 (1920). The extension was undoubtedly designed to prevent American seamen, who could sue, from being replaced by those who could not. *Id.* at 355-56, 40 S.Ct. 350. The statute is of special relevance here where the plaintiffs are foreigners and where counsel for Royal Caribbean acknowledge in their brief that many of its employees are foreigners.

Even with the significant change in bargaining power brought about by the National Labor Relations Act of 1937, the seaman's right to sue directly for his wages was prized by individual seamen and upheld by the Supreme Court. *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). Deciding *Arguelles,* the Supreme Court noted that the explicit remedy permitting the seamen's suit was "not clearly taken away" by the National Labor Relations Act. *Id.* at 357, 91 S.Ct. 409. The Court added: "What Congress has plainly granted we hesitate to deny." *Id.* And the Court did not deny it. This precedent speaks powerfully in the case at bar.

Federal solicitude for the seaman is today embodied in 46 U.S.C. § 10313, simply entitled "Wages." The statute begins by specifying when a seaman's "entitlement to wages and provisions" begins. The statute provides that wages "are not dependent on the earning of freight by the vessel." The statute provides for payment to a seaman before the beginning of the

voyage and for non-payment if refusing to work. Near the center of the statute is this provision: "After the beginning of the voyage, a seaman is entitled to receive from the master on demand one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage." At the end of a voyage the master must pay the balance of wages due within 24 hours after the voyage ends. The master or owner is liable for 2 days wages for each day payment is delayed. Exclusions and inclusions within the statute are spelled out. Excluded from some provisions are fishing and whaling vessels and yachts. Included are seamen "on a foreign vessel when in a harbor of the United States."

This last provision must be considered in relation to what Chapter 103 – Foreign and Intercoastal Voyages embraces. The introductory language reads: "Except as otherwise specifically provided, this chapter applies to a vessel of the United States on a voyage between a port in the United States and a port in a foreign country (except a port in Canada, Mexico, or the West Indies)." If this portion of Chapter 103, which is entitled "Application," confines the chapter to U.S. vessels and requires that the voyage be between the United States and the non-excluded parts of the world, then the Wage Act has no application here. But the Wage Act specifically provides that it applies to seamen "on a foreign vessel when in a harbor of the United States." No requirement that the vessel be American. No requirement that the vessel's voyage have a particular international destination. It

appears that the particular controls the general and that the statute protects foreign seamen in an American port. This reading is confirmed by a broad grant of jurisdiction that concludes the statute: "The courts are available to the seaman for enforcement of this section."

The provisions of Chapter 103 of Title 46 should be read in harmony with a second statute simply denominated "Seamen's suits." It reads as follows: "In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health and safety without prepaying fees or costs or furnishing security therefor." 28 U.S.C. § 1916.

As set out in the current U.S.Code, the Wages Act incorporates amendments made in 1983 and in 1986. Neither it nor the Seamen's suits Act have been repealed. They contain no reference to federal law on arbitration. The careful exclusions of the Wages Act do not mention the subject. It is nonetheless the contention of Royal Caribbean that both statutes have been substantially repealed as to foreign seamen. Let us examine the basis for this remarkable contention.

The first step in Royal Caribbean's case is page 1 of a fax of a printed form entitled Sign-On Agreement dated November 1, 2005. Its first part provides the make of the ship, the M/V Monarch of the Seas and the name of Hulya Kar, her age, and her residence is

Istanbul, Turkey. The second part identifies her job: "Assistant Waiter," the portion of her "basic pay payable by the company:" $50; her monthly overtime rate: $3.98; her monthly vacation pay: 0; her daily sick wage rate: $15.30; and her monthly guaranteed pay: $890, specified to be "inclusive of all gratuities provided by passengers."

The form then states in the first person an acknowledgment that the employer may terminate the agreement on 7 days notice. It continues: "I further understand and agree that the Collective Bargaining Agreement between the Company and the Union is incorporated into and made part of this Employment Agreement and that I and the Company are bound by its terms and conditions."

The document is signed by the employee. In a new paragraph on the same page appears the following: "I acknowledge having received copies of (1) the Collective Bargaining Agreement referred to above effective on the date of this Employment Agreement; (2) The Employee Handbook." The signature line under this statement is for the signature of the "Payroll Purser" and is apparently so signed and dated by him.

A Collective Bargaining Agreement (CBA) between Royal Caribbean and the Norwegian Seafarers Union is included in the excerpt of record. It occupies 24 pages. Its signature on behalf of the company is dated August 23, 2005 but Article 28 provides that it "is effective from January 1, 2005."

Article 26 of the CBA is entitled "Grievance and Dispute Resolution Procedure." Section (b) of this article states what is to happen "if the dispute is one involving the amount of wages paid to the Seafarer." On receiving notice of "a grievance" in this regard, the Employer has the right within 60 days to either pay the amount claimed or to deposit it in an interest-bearing account. If the legal resolution of the grievance is in favor of the employee, he receives no more than the sum deposited by the Company plus the accrued interest. Section (d) of Article 26 provides the procedure for the resolution of "all grievances and any dispute whatsoever." It is to be "by binding arbitration pursuant to the United Nations Convention."

The drift of Royal Caribbean's argument is now evident: By signing on to the form, Kar agreed to arbitrate as the CBA provided, and the CBA provides no place for an action in a federal court. By contract Kar has no choice but to arbitrate.

What's wrong with this argument? It assumes that the rights conferred on seaman by U.S.C. § 10313 may be waived by contract. The assumption runs counter to general maritime law. Again, Justice Story is a good guide: Bargains between shipowners and seaman are scrutinized "with scrupulous jealousy" by courts of admiralty. *Brown v. Lull,* 4 F.Cas. 407, 409 (D.Mass.1936). Any stipulation in the shipping articles derogating from the seaman's rights is void unless the clause was "fully and fairly explained to the seamen" and they were compensated for the waiver. *Id.* This approach has prevailed: "The analogy

suggested by Justice Story between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as wards of admiralty, a close one." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247, 63 S.Ct. 246, 87 L.Ed. 239 (1942). The shipowner who relies on a seaman's release of his rights must show "that it was executed freely, without deception or coercion and that it was made by the seaman with full understanding of his rights." *Id.* at 248, 63 S.Ct. 246.

In our case, Kar has stipulated that she signed the Sign-On Agreement which incorporated the CBA. She has not stipulated that she saw the CBA, read it, or understood it, or that her attention was drawn to the federal rights she was waiving. The most we have from the Sign-On Agreement is that "copies" of the CBA were received by someone, apparently the purser. In the absence of any stipulation or other evidence, the incorporation of the arbitration clause into the Sign-On Agreement was void.

Royal Caribbean attempts to avoid this conclusion by this line of argument: The Convention, admittedly not selfexecuting, has been enacted into federal law by 9 U.S.C. § 202. This statute commands the federal courts to enforce all international agreements to arbitrate, no exceptions admitted. It is Royal Caribbean's position that it is this statute, not Kar's Sign-On Agreement that puts a dent or, rather, a hole in 46 U.S.C. § 10313's set of rights and remedies.

This contention is a slight of hand. The statute enforcing the Convention comes into play only if there is a valid agreement to arbitrate. We have already determined that no such agreement exists. The international arbitration statute has not been set in motion.

And even if it were, what rule of construction would tell us that the statute, enacted in 1971, trumps a statute that long preceded it and was amended and codified in the 1980's? To suppose that Congress in 1971 meant to repudiate a role for federal courts that went back to 1790 – and did so without a single explicit word – is to engage in unlikely fantasy. To suppose that Congress in the 1980's kept alive a statute expressly opening the federal courts to foreign seamen when the alleged sense of the 1971 statute mandated arbitration in their place is to credit Congress with absentmindedness and to fail to acknowledge the later statute as the governing statute. *Frost v. Wenie,* 157 U.S. 46, 57, 15 S.Ct. 532, 39 L.Ed. 614 (1895) (per Harlan, J.).

In *Arguelles,* a new and powerful national policy, collective bargaining, was urged to have led to legislation making obsolete and defunct the seaman's direct remedy in federal court. In our case a new and powerful national policy in favor of international arbitration is urged to reach the same result. But neither the National Labor Management Relations Act nor the Convention addressed the seaman's statutory rights. No more than the Court in the *Arguelles* case should we do what Congress did not do

and proclaim the elimination of the statutory remedy for foreign seamen. Congress has chosen to set in place two routes for the seaman, including the foreign seaman. He or she may arbitrate or he or she may proceed without paying costs to sue in a federal district court.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Michael Rogers & Hulya Kar, Plaintiffs, v. Royal Carribean [sic] Cruise Lines, Defendant.	Case No: CV 06-4574-SVW (Ex) ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION [13] (Filed Jan. 25, 2007)

I. INTRODUCTION

This case involves a purported class of seafarers seeking unpaid wages. Plaintiffs Michael Rogers[1] and Hulya Kur[2] ("Plaintiffs") allegedly worked for Defendant Royal Caribbean Cruise Line. Defendant filed a motion to compel arbitration of Plaintiffs' claims.[3]

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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[1] Rogers is allegedly a citizen of Trinidad. (Workman Decl. ¶4.) Defendant states that it has no record of him ever working as an employee. (*Id.*)

[2] Kur is a citizen of Turkey. (Workman Decl. Ex. A.)

[3] Defendant also filed a motion to dismiss pursuant to Rule 12(b)(6) Because the motion to compel arbitration is dispositive of Plaintiffs' claims, the Court does not reach the merits of this motion.

("The Convention Act"), 330 U.N.T.S.3, 9 U.S.C. 202-208 (2002), mandates that district courts recognize and enforce certain foreign arbitration agreements and awards.[4] Plaintiffs' employment agreements incorporate a collective bargaining agreement ("CBA") which contains an arbitration clause. The CBA provides that "all grievances and any other dispute whatsoever . . . shall be referred to and resolved exclusively by binding arbitration." (Workman Decl. Ex. B: Art. 26(d)).

Plaintiffs contend that the arbitration provision is unenforceable as a matter of law because the arbitration provisions are unreasonable, unconscionable, and contrary to public policy. Even if the arbitration provision were enforceable, Plaintiffs argue that the Convention does not apply because the Federal Arbitration Act ("FAA") contains an exemption for seaman. Additionally, Plaintiffs assert that their claims are immunized from arbitration under *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351 (1971). For the reasons discussed below, the Convention Act compels the Court to enforce the arbitration agreement and therefore the Court GRANTS Defendant's motion to compel arbitration.

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[4] A Contracting State "shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen . . . between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Convention Act, art. II(1).

II. THE CONVENTION ACT REQUIRES ENFORCEMENT OF THE ARBITRATION, AGREEMENT

In a motion to compel arbitration, "[t]he court's role . . . limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

A. A Valid Agreement to Arbitrate Exists

Given the "liberal federal policy favoring arbitration agreements . . . the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Financial Corp. – Alabama v. Randolph,* 531 U.S. 79, 91 (2000); *see also Lobo v. Celebrity Cruises, Inc.,* 426 F.Supp.2d 1296, 1309 (S.D.Fla. 2006) ("Because of the strong presumption in favor of arbitration, a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.") (citing *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 906 (5th Cir. 2005)). However, "[i]n determining the validity of an agreement to arbitrate, federal courts 'should apply ordinary state-law principles that govern the formation of contracts." *Circuit City Stores v. Adams,* 279 F.3d 889, 892 (9th Cir. 2002) (citing *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995)). In analyzing whether a valid agreement

to arbitrate exists, the Court looks to state-law contract principles of Florida law.[5]

Plaintiffs initially disputed that they had signed employment agreements which incorporated the arbitration provision. However, at the hearing on December 11, 2006, Plaintiffs' counsel agreed to stipulate that both Plaintiffs had signed employment contracts which incorporated the arbitration provision. Therefore, an agreement to arbitrate exists. The next issue to determine is whether the agreement is valid.

Plaintiffs object to the agreement on the grounds that it is unreasonable, unconscionable, and contrary

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[5] In determining which state law principles to examine, the Court must conduct a choice of law analysis. "Generally, '[i]n a diversity case, a federal court must apply the choice of law rules of the state in which the action was filed.'" *Chuidian v. Philippine Nat. Bank*, 97.6 F.2d 561, 564 (9th Cir. 1992) (quoting *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 645 (9th Cir.1988)). However, where federal question jurisdiction exists, federal common law rules apply. *Chuidian*, 976 F.2d at 564. The Court has admiralty jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1333. Therefore, federal common law rules apply regarding the choice of law.

"Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws." *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002). The Restatement (Second) of the Conflict of Laws § 187 provides that the law of the state chosen by the parties to govern their contractual rights will be applied. The CBA contains a Florida choice of law provision. (Workman Decl. Ex.B: Art. 27.) Therefore, Florida contract law governs the Court's analysis of whether an agreement to arbitrate exists.

to public policy. "Under Florida law, determining the unconscionability of any contract involves two separate components: procedural unconscionability and substantive unconscionability." *Hughes v. Alltel Corp.*, 2004 U.S. Dist. LEXIS 20705, *9 (N.D. Fla. 2004) (citing *Powertel. Inc. v. Bexley,* 743 So. 2d 570, 574 (1999)). Plaintiffs assert that the CBA is procedurally unconscionable given the difference in bargaining power between the parties. "The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." *Hughes,* 2004 U.S. Dist. LEXIS 20705 at *9 (quoting *Powertel. Inc.,* 743 So. A at 574); *see also Sims v. Clarendon Nat'l Ins, Co.,* 336 F. Supp. A 1311, 1322 (S.D. Fla 2004) (same). This argument lacks merit because the CBA was the result of an arms-length bargaining process between the Plaintiffs, union and Defendant. *See Bautista,* 286 F. Supp. 2d at 1362-63.

Plaintiffs contend that the CBA is substantively unconscionable because the arbitration provision "is notably and unfairly sided in favor [of Defendant]." (Pls.' Opp. at 21.) Substantive unconscionability "focuses on the agreement itself' and it involves such issues as whether "the terms of the contract are unreasonable and unfair." *Hughes,* 2004 U.S. Dist. LEXIS 20705 at *9-10 (quoting *Powertel. Inc.,* 743 So. 2d at 574); *see also Sims,* 336 F. Supp. 2d at 1321 (same). First, Plaintiffs contend that the arbitration

provision is unfair because the Union and Defendant appoint the arbitrators without any input from the crew members. This argument lacks merit because the Union represents the crew members, interests when selecting an arbitrator. Moreover, Plaintiffs do not allege any other factors supporting the allegation of substantive unconscionability. For example, Plaintiffs do not allege that they tried to negotiate the terms of the employment agreement, Plaintiffs do not argue that they would suffer adverse consequences if forced to acquiesce to the arbitration provision, Plaintiffs do not argue that they were denied a fair opportunity to learn about the arbitration agreement, nor do Plaintiffs allege that they were unable to read or understand the terms of the arbitration agreement.

Second, Plaintiffs argue that the arbitration provision is unfair because "the procedure requires arbitration of issues involving federal maritime law to be resolved in distant fora based on the crew member's citizenship, without relationship to where the crew member, is residing, where the evidence is located, where the witnesses live, [or] where the alleged dispute arose." (Pls.' Opp. at 21.) This argument lacks merit because it appears presumptively fair to the crew member to arbitrate a dispute in the crew member's own country of citizenship. At the very least, Plaintiffs have failed to meet their burden of demonstrating that the contract provision is substantively unconscionable because crew members must return to their home country to arbitrate claims.

Finally, Plaintiffs argue that the agreement to arbitrate is unenforceable because it violates public policy. This argument falls flat in light of the abundant authority demonstrating the "emphatic federal policy in favor of arbitral dispute resolution [which] applies with special force in the field of international commerce." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 631 (1985)). The Ninth Circuit has explained that arbitration agreements involving international companies deserve "great deference":

> According to the Supreme Court, when international companies commit themselves to arbitrate a dispute, they are in effect attempting to guarantee a forum for any disputes. Such agreements merit great deference, since they operate as both choice-of-forum and choice-of-law provisions, and offer stability and predictability regardless of the vagaries of local law

Republic of Nicaragua, 937 F.2d at 478.

Plaintiffs ignore the weight of these decisions emphasizing deference, instead selecting snipets of opinions discussing the federal courts' historic protection of seamen. Defendant points out that the cases Plaintiffs rely on involve United States domestic policies designed to protect U.S. seafarers. To the extent that these policies might apply to foreign seafarers, Congress made a clear policy decision in favor

of arbitration when it subsequently enacted the convention.

Plaintiffs also argue that the arbitration provision violates public policy because it deprives the Plaintiffs of their right to jury trial. Plaintiffs assert that they have a right to a jury trial to determine issues of arbitrability. However, 9 U.S.C. § 4 provides that "[i]f no jury trial be demanded by the party alleged to be in default, *or if the matter in dispute is within admiralty jurisdiction,* the court shall hear and determine such issue." (emphasis added). Similarly, Plaintiffs' argument that arbitration deprives Plaintiffs of the right to a jury trial clearly lacks merit.[6] Therefore, the Court finds that the agreement to arbitrate is valid.

B. The Agreement Encompasses the Dispute at Issue

The parties do not dispute that the dispute falls within the scope of the parties' agreement to arbitrate. The arbitration agreement covers "all grievances and

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[6] *See e.g., Cooper v. MRM Inv. Co.,* 367 F.3d 493, 506 (6th Cir. 2004) ("[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate . . . [citations] The Seventh Amendment confers not the right to a jury trial per se, but rather "only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes. [citations]")

any other dispute whatsoever, whether in contract, regulatory, tort, or otherwise, including constitutional, statutory, common law, admiralty, intentional tort and equitable claims, relating to or in any way connected with seafarer's service." (Workman Decl. Ex. B, Art. 26.) Because the dispute at issue involve unpaid wage claims, the agreement to arbitrate clearly encompasses the dispute. *See, e.g., Republic of Nicaragua,* 937 F.2d at 479 (interpreting "any and all disputes" broadly).

Finding that the agreement to arbitrate is valid and the agreement encompasses the dispute at issue, the Court must next analyze whether the Convention Act compels enforcement of the agreement.

C. The Convention Act Compels Enforcement of the Agreement

Three statutes comprise Title 9: the FAA.[7] comprises Chapter 1, the Convention Act comprises Chapter 2, and Chapter 3 contains the "Inter-American Convention on International Commercial Arbitration." 9 U.S.C. 1-16, 202-208, 301-307. Although all

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[7] Although some courts have referred to all of Title 9 as the FAA, *see, e.g., Indus. Risk Insurers v. M.A.N. Gutchoffnungshutte GmbH,* 141 F.3d 1434, 1440 (11th Cir. 1998), Chapter 1 contains the general provisions of the FAA while Chapter 2 contains the codification of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards." Therefore, this opinion uses FAA to refer to the statute contained in Chapter 1 and the "Convention Act" to refer to Chapter 2.

three Acts relate to arbitration, "each act has a specific context and purpose." *Bautista v. Star Cruises,* 396 F.3d 1289, 1297 (11th Cir. 2005).

Assuming an arbitration agreement exists, Plaintiffs' claims are clearly covered by the Convention Act which governs any "arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2."

To determine whether to enforce an arbitration provision, the court must determine that "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states." *Bautista,* 396 F.3d at 1295 (citing *Std. Bent Glass Corp. v. Glassbots Oy,* 333 F.3d 440, 449 (3d Cir. 2003)). A court must order arbitration if these four elements are satisfied. *Bautista,* 396 F.3d at 1295; *Std. Bent Glass Corp.,* 333 F.3d at 449; *Francisco v. Stolt Achievement MT,* 293 F.3d 270, 273 (5th Cir. 2002). "The Convention Act 'generally establishes a strong presumption in favor of arbitration of international commercial disputes.'" *Bautista,* 396 F.3d at 1295 (quoting *Indus. Risk Insurers v. M.A.N.*

Gutehoffnungshutte GmbH, 141 F.3d 1434, 1440 (11th Cir.1998)). All four elements are satisfied.[8]

1. The Agreement to Arbitrate Is in Writing

First, the agreement to arbitrate is in writing. The agreement to arbitrate is contained in the CBA, which is a written contract signed by Plaintiffs' Union and Defendant.[9] (Workman Decl. Ex. B.)

2. Arbitration Would Take Place in the Territory of a Signatory to the Convention

Second, arbitration would take place in the territory of a signatory to the convention. Article 26 of the CBA provides that the place of arbitration shall be either "in the Seafarer's country of citizenship or the Ship's flag state, unless arbitration is unavailable under the convention in those countries, in which case only said arbitration shall take place in Miami, Florida." (Workman Decl. Ex. B.) Plaintiff Kar is a citizen of Turkey and Plaintiff Rogers is a citizen of Trinidad and Tobago. Therefore, arbitration would take glace in the territory of a signatory because

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[8] Plaintiffs do not contest that all four elements are satisfied in their opposition to Defendant's motion for summary judgment.

[9] The "Sign-On Employment Agreement" between Plaintiffs and Defendant incorporated the CBA. (Workman Decl. Ex. A.)

Turkey and Trinidad and Tobago are signatories to the Convention. *See* 9 U.S.C.A. § 201.

3. The Agreement Arises Out of a Commercial Relationship

Third, the agreement must arise out of a legal relationship "which is considered commercial." *Id.* at 1296. The Ninth Circuit has never addressed whether seamen employment contracts are "commercial" for the purposes of the Convention. However, the Fifth and Eleventh Circuits have addressed this issue and both concluded that seamen employment contracts and the arbitration provisions in such contracts are "commercial legal relationships within the meaning of the Convention Act." *Bautista,* 396 F.3d at 1300 *Stolt,* 293 F.3d at 274. *See also Lobo v. Celebrity Cruises, Inc.,* 426 F. Supp. 2d 1296, 1298-99 (S.D. Fla. 2006). Therefore, the Court finds that the agreement to arbitrate arises out of a commercial relationship.

4. A Party to the Agreement is not an America Citizen

Finally, neither Plaintiff is an American citizen. Therefore all four elements are satisfied and the Court must compel arbitration.

D. The FAA Seamen Exemption Does Not Apply to Claims Covered by the Convention Act

Plaintiffs argue that the Convention does not apply because the Federal Arbitration Act ("FAA") contains an exemption for seaman. While the Convention Act clearly covers the alleged arbitration agreement, 9 U.S.C. § 1 provides that "contracts of employment of seamen" are exempted from the general provisions of the FAA. 9 U.S.C. § 202. The issue for the Court to determine is whether this seamen employment contract exemption, contained in the FAA, exempts an arbitration agreement otherwise covered by the Convention Act.

The Ninth Circuit has never addressed this issue. However, the Fifth and Eleventh Circuits have addressed this precise issue and both Circuits held that the FAA seamen exemption does not apply to arbitration agreements under the Convention Act. *Bautista,* 396 F.3d at 1292; *Freudensprung v. Offshore Tech. Servs., Inc.,* 379 F.3d 327 (5th Cir. 2004); *Francisco v. Stolt Achievement MT,* 293 F.3d 270 (5th Cir. 2002). *See also Acosta v. Norwegian Cruise Line, Ltd.,* 303 F.Supp.2d 1327 (S.D.Fla. 2003) (holding that seamen exemption does not apply); *Adolfo v. Carnival Corp.,* 2003 WL 23829352, (S.D.Fla. Mar. 11, 2003) (same); *Amon v. Norwegian Cruise Lines, Ltd.,* 2002 U.S. Dist. LEXIS 27064 (S.D.Fla. Sept. 26, 2002) (same). Although this Court is not bound by *Bautista, Freudensprung,* or *Francisco,* the Court finds the reasoning of these Circuits compelling. Accordingly, the

Court holds that the exemption for seamen does not apply to claims covered by the Convention Act.[10]

E. Plaintiffs' Claims are Not Immunized From Arbitration under *Arguelles*

Plaintiffs assert that their claims are immunized from arbitration under *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351 (1971). Plaintiffs argue that under the holding in *Arguelles,* the arbitration clause in the CBA does not defeat an individual seaman's right to bring a statutory wage claim pursuant to 46 U.S.C. § 10313. In *Arguelles,* the Supreme Court held that § 301 of the LMRA, which enforces grievance and arbitration provisions of CBAs, does not abrogate the statutory remedy of a seaman to sue for wages in federal court. *Id.* at 375.

Plaintiffs' reliance on *Arguelles* is misplaced because its holding involves the Labor Management

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[10] Whether the seamen exemption contained in 9 U.S.C. § 1 applies to the Convention Act contained in 9 U.S.C. §§ 202-208 is an issue of statutory interpretation. There are two ways in which Title 9 addresses conflicts between the three acts comprising Title 9. First, provisions of the Convention Act and Inter-American Act directly incorporate certain sections of the FAA. Second, the Convention Act and Inter-American Act residually incorporate the provisions of the FAA to the extent that they do not conflict with the provisions of the Act. 9 U.S.C. §§ 208, 307. Because the Convention Act does not apply directly or residually incorporate Section 1, the seamen exemption does not apply to arbitration covered by the Convention Act. *See Francisco,* 293 F.3d at 273-76.

Relations Act rather than the Convention Act. The Supreme Court did not address whether the Convention Act abrogates the statutory remedy of a seaman to sue for remedies because *Arguelles* was decided *before* the Convention Act was implemented. Thus, the specific holding of *Arguelles* is limited to the LMRA.

The differing policy goals of the LMRA and the Convention Act support the conclusion that the holding in *Arguelles* should not be extended to the Convention Act. The Supreme Court's decision in *Arguelles* was based on its determination that the main purpose of § 301 of the LMRA was suits by unions rather than claims by individual workers and as a result Congress had not intended to restrict the traditional protections afforded to seamen in federal court:

> Enforcement by or against labor unions was the main burden of § 301, though standing by individual employees to secure declarations of their legal rights under the collective agreement was recognized. Since the emphasis was on suits by unions against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of § 301 on the special protective procedures governing the collection of wages of maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration procedures were to

> take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seaman since 1790.

Arguelles, 400 U.S. at 355-56. As a result, the Court concluded that the federal courts' historical protection of seamen was not abrogated by the LMRA.

In contrast, the purpose of the Convention Act is "the recognition and enforcement of arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n.15 (1974). In furtherance of this purpose, the Convention Act encompasses a broad range of agreements. *See* 9 U.S.C. § 202 ("An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.") As the Eleventh Circuit has explained, this primary purpose of the Convention Act would be frustrated "if domestic courts were to inject their 'parochial' values into the regime." *Bautista,* 396 F.3d at 1300. If this Court were to extend *Arguelles* to the Convention Act and create an exemption for seamen, the Court would be frustrating the core purpose of the Convention Act.

Additionally, one of the justifications for the Supreme Court's holding in *Arguelles* was that the

Court could find no evidence that "grievance procedures and arbitration procedures [of the LMRA] were to take the place of the old shipping commissioners." *Arguelles,* 400 U.S. at 356. The Office of the U.S. Shipping Commissioner no longer exists and instead unions protect the interests of seamen through collective bargaining and grievance procedures. *See* 44 Fed. Reg. 70, 155 (Dec. 6, 1979). As a result, it is reasonable to infer the Convention Act, which enforces arbitration provisions of collective bargaining agreements, was intended to replace the traditional protections of certain seamen.

As a result, the Court finds that it would be inconsistent with the Supreme Court's interpretation of the Convention Act to extend the holding in *Arguelles* beyond the LMRA. This interpretation is consistent with the handful of other courts that have examined this and similar issues. In *Lobo v. Celebrity Cruises, Inc.,* 426 F. Supp. 2d 1299-1301 (S.D.Fla. 2006) a district court confronted with this precise issue determined that a seaman's federal wage claims were not exempt from the Convention Act under *Arguelles. See also Lim v. Offshore Specialty Fabricators, Inc.,* 404 F.3d 898 (5th Cir. 2005) (rejecting Filipino seaman's argument that arbitration had never been required in seamen's wage litigation and enforcing arbitration under the Convention); *Bautista,* 396 F.3d at 1289 ("In pursuing effective, unified arbitration standards, the Convention's framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their

"parochial" values into the regime: 'In their discussion of [Article II(1)], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.') (quoting *Scherk,* 417 U.S. at 520 n. 15).

Therefore, the Court concludes that *Arguelles* does not preclude enforcement of the arbitration agreement under the Convention.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motions to compel arbitration and Plaintiff's complaint is dismissed without prejudice.

IT IS SO ORDERED.

DATED: 1/24/07 /s/ Stephen V. Wilson
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Michael ROGERS; Hulya Kar, individually and on behalf of all other similarly situated seafarers and as private attorney general,

Plaintiffs-Appellants,

v.

ROYAL CARIBBEAN CRUISE LINE; M/V Monarch of the Seas,

Defendants-Appellees.

No. 07-55071.

ORDER DECEMBER 19, 2008

Before: NOONAN, W. FLETCHER and GOULD, Circuit Judges.

Judges Fletcher and Gould have voted to deny the petition for rehearing and to deny the petition for rehearing en banc; Judge Noonan has voted to grant the petition for rehearing and recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc, filed November 20, 2008, are DENIED.

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No. 08-1179

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MICHAEL ROGERS and HULYA KAR,

Petitioners,

v.

ROYAL CARIBBEAN CRUISES LTD.
and M/V MONARCH OF THE SEAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Ninth Circuit's decision affirming the district court's enforcement of the parties' contractual mandatory arbitration provision in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), and its implementing legislation, 9 U.S.C. §§202-208 (the "Convention Act"), does not conflict with a decision of this Court or a Court of Appeals, and does not implicate an important question of federal law that has not been, but should be, settled by the Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Royal Caribbean Cruises Ltd. (which Petitioners erroneously refer to as "Royal Caribbean Cruise Lines") has no parent corporation, and there is no publicly traded company that owns 10% or more of its stock. *M/V Monarch of the Seas* is a cruise ship that is operated by Royal Caribbean Cruises Ltd.

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INTRODUCTION

There are no "compelling reasons" warranting the exercise of certiorari jurisdiction over this action. *See* Supreme Court Rule 10. The Ninth Circuit's decision does not conflict with a decision from this Court or a circuit court, nor does it implicate an important question of federal law that has not been, but should be, settled by the Court.

The Petition merely rehashes arguments that have been rejected by every circuit court to have considered them, thus highlighting the lack of conflict and the non-existence of an important question of federal law that should be settled by the Court. The Petition also attempts to characterize the Ninth Circuit as having held that *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971) is no longer good law, and that all claims under 46 U.S.C. §10313 can be forced into arbitration. The Ninth Circuit did no such thing. The Ninth Circuit held only that where all the elements of the Convention are satisfied (Petitioners did not dispute on appeal that all the elements were satisfied), courts are required to compel arbitration and are not permitted, out of a parochial desire to protect seamen or for any other reason, to legislate or create an exemption from the Convention for claims brought under §10313.

There is no basis for the Court to exercise certiorari jurisdiction over this action.

STATEMENT OF THE CASE

Petitioners Hulya Kar and Michael Rogers filed their Verified First Amended Complaint[1] against Respondents Royal Caribbean Cruises Ltd.[2] and *M/V Monarch of the Seas* (collectively, "Royal Caribbean"). Ms. Kar and Mr. Rogers were employed by Royal Caribbean Cruises Ltd., and *M/V Monarch of the Seas* is a cruise ship operated by Royal Caribbean Cruises Ltd. that they allegedly worked aboard during the course of their employment.

The six-count Verified First Amended Complaint purported to state claims against Royal Caribbean for: (1) unpaid wages and penalty wages under 46 U.S.C. §§10313(f) and (g); (2) breach of contract; (3) unjust enrichment; (4) alleged violations of Cal. Bus. & Prof. Code, §§17000 *et seq.* (the "UCL"); (5) Cal. Labor Code §§2698-2699.5, Labor Code Private Attorneys General Act of 2004; and (6) declaratory relief.

Royal Caribbean filed a Motion to Compel Arbitration and to Dismiss First Amended Complaint, Or, Alternatively, To Dismiss The First, Fourth, and Fifth Causes of Action. Royal Caribbean also filed a memorandum of law and a declaration in support of the motion. As relevant here, the motion asserted that the

---

1. The pleading was "verified" by counsel for Ms. Kar and Mr. Rogers.

2. The entity named as a defendant in the First Amended Complaint was "Royal Caribbean Cruise Lines." There is no such entity. The entity's correct name is Royal Caribbean Cruises Ltd.

Convention required the district court to enforce a mandatory arbitration provision contained in the collective bargaining agreement governing Ms. Kar's and Mr. Rogers's employment.

The district court granted Royal Caribbean's motion, and entered an Order compelling arbitration and dismissing without prejudice the First Amended Complaint (Pet. App. 34-51).

Ms. Kar and Mr. Rogers timely appealed the district court's order. The Ninth Circuit affirmed the district court's order (Pet. App. 1-33). The Ninth Circuit's decision is reported at 547 F.3d 1148. Ms. Kar and Mr. Rogers petitioned the Ninth Circuit for rehearing and rehearing *en banc*, and the Ninth Circuit denied those petitions (Pet. App. 52). Ms. Kar and Mr. Rogers timely filed their petition for a writ of certiorari.

STATEMENT OF THE FACTS

Ms. Kar worked as an assistant waiter aboard cruise ships operated by Royal Caribbean. Mr. Rogers claimed he worked as a cabin boy or stateroom attendant aboard cruise ships operated by Royal Caribbean, but Royal Caribbean has been unable to locate any records indicating that Mr. Rogers was ever employed by Royal Caribbean.

Ms. Kar and Mr. Rogers conceded that they signed employment agreements that governed their employment with Royal Caribbean, and that the employment agreements incorporated the terms of a collective bargaining agreement entitled "Agreement

Between Royal Caribbean Cruises Ltd. and Norwegian Seafarers' Union for Marine Officers and Deck and Engine Ratings and Riding Crew and Hotel Personnel Serving on Cruise Vessels Under The Royal Caribbean Brand" (the "CBA"). The CBA was negotiated at arms' length by Celebrity and Ms. Kar's and Mr. Rogers's union, the Norwegian Seafarer's Union (the "Union"), and the CBA was signed by Celebrity and the Union. The CBA contained a mandatory arbitration provision.

Ms. Kar and Mr. Rogers alleged that they were not paid all of the wages and overtime wages to which they were entitled under the employment agreement and the CBA. They also alleged that when they were paid, they were not paid on time. Although the claims pleaded in the Verified First Amended Complaint were subject to the mandatory arbitration provision contained in the CBA, which is also incorporated by reference into the employment agreements, Ms. Kar and Mr. Rogers chose to assert their claims in federal district court, and not in arbitration.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among The Circuits Or With A Decision Of This Court Regarding Application Of The Convention To Claims Brought Under 46 U.S.C. §10313.

In affirming the district court's Order that Ms. Kar and Mr. Rogers were required to arbitrate the claim they brought under 46 U.S.C §10313, the Ninth Circuit joined the Eleventh Circuit (the only other circuit to have considered this issue) in holding that if all the elements of the Convention and the Convention Act are satisfied – and if none of the recognized defenses to enforcement of the Convention and Convention Act are established – then courts must compel arbitration and are not permitted to exempt from the Convention and Convention Act claims brought under §10313. *See Lobo v. Celebrity Cruises Inc.*, 488 F.3d 891 (11th Cir. 2007).

In an attempt to create a conflict among the circuits, Ms. Kar and Mr. Rogers argue that the Ninth Circuit's decision conflicts with *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568 (2d Cir. 1960); *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981); *Lakos v. Saliaris*, 116 F.2d 440 (4th Cir. 1940); *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240 (5th Cir 1991).

None of those decisions involved arbitration, and none of them involved application of the Convention or the Convention Act, which means none of them addressed the issue of whether arbitration is required for claims brought under § 10313 when all the elements of the Convention and Convention Act are satisfied. It

is impossible for those decisions to conflict with the Ninth Circuit's decision because those decisions did not address arbitration or the applicability of the Convention and Convention Act.

In apparent recognition that those decisions did not involve arbitration or the Convention and Convention Act, Ms. Kar and Mr. Rogers argue that they nonetheless conflict with the Ninth Circuit's decision because they vest federal courts with "mandatory" jurisdiction over claims brought under §10313, and the Ninth Circuit's decision ignores such mandatory jurisdiction.

The fact that those decisions did not address the Convention and Convention Act is fatal to Ms. Kar's and Mr. Rogers's argument regarding "mandatory" jurisdiction because §10313 does *not* make the courts an *exclusive* forum for the claims, but the Convention *does* make arbitration the exclusive forum where all the elements of the Convention are met. Put another way, where, as here, all of the elements of the Convention are satisfied, it is *mandatory* for courts to compel arbitration. *See, e.g., Lobo*, 488 F.3d at 895 ("the Convention *compels* federal courts to direct qualifying disputes to arbitration") (emphasis in original); *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002) (quoting *Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985)) ("'If [the elements of the Convention are met], the Convention *requires* district courts to order arbitration.'") (emphasis added); *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974) ("The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate.").

In an attempt to create a conflict between the Ninth Circuit's decision and a decision of this Court, Ms. Kar and Mr. Rogers point to the Court's decision in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971). As shown below, there is no conflict with *Arguelles*.

In *Arguelles*, the plaintiff-seaman was subject to a collective bargaining agreement that "provided a grievance procedure and for arbitration of disputed claims." *See Arguelles*, 400 U.S. at 351. The *only* issue the Court addressed in *Arguelles* was whether §301 of the Labor Management Relations Act (the "LMRA") required the seaman to submit his claim for unpaid wages and penalty wages to a grievance procedure and, ultimately, to arbitration. *See Lobo*, 488 F.3d at 894-95 ("At issue in *Arguelles* was to what extent, if any, the enforcement mechanism of the LMRA required the plaintiff-seaman to submit his statutory claim for wages to arbitration as provided in his collective bargaining agreement.").

The Court *did not* address in *Arguelles*, or even mention, the Convention and Convention Act. *See Lobo*, 488 F.3d at 895 ("The Court did not mention the Convention, much less its applicability to Arguelles' claim."); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 907 (5th Cir. 2005) (in a decision addressing the applicability of the Convention, distinguishing *Arguelles* from situations involving the applicability of the Convention because "at issue in *Arguelles* was the duty to follow the collective bargaining grievance procedure under the LMRA, a statute and procedure absent here").

Indeed, the Convention "[e]ntered into force with respect to the United States of America [on] December 29, 1970." *See* 21 U.S.T. 2517. *Arguelles* was completely briefed by October 28, 1970, more than two months *before* the Convention went into effect. *Arguelles* was argued before the Court on November 12, 1970, more than one month *before* the Convention went into effect. The Court issued its decision in *Arguelles* on January 13, 1971, fifteen days *after* the Convention went into effect. Thus, the Court had no occasion or opportunity to address the Convention in *Arguelles*. *See Lobo*, 488 F.3d at 895 (because "the briefing and oral argument in *Arguelles* occurred prior to the implementation of the Convention" and "the opinion in *Arguelles* was issued only days" after implementation of the Convention, "we are convinced that the Court did not have the opportunity to consider the Convention in the context of Arguelles' claim").

Irrespective of why the Convention was not addressed in *Arguelles*, the fact it was not addressed is crucial because the underlying policy and goals of the LMRA – which formed the basis of the Court's decision – are markedly different than the underlying policy and goals of the Convention, especially in the context of enforcing arbitration provisions contained in international seamen employment contracts.

Specifically, at the core of the decision in *Arguelles* was the Court's finding that:

> Enforcement by or against labor unions was the main burden of s 301, though standing by individual employees to secure declarations of

> their legal rights under the collective agreement was recognized. Since the emphasis was on suits by unions against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of s 301 on the special protective procedures governing the collection of wages of maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration procedures were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790.

See Arguelles, 400 U.S. at 355-56; *see also Lobo*, 488 F.3d at 895 (quoting *Arguelles*, 400 U.S. at 357) ("[T]he underlying basis of the Supreme Court's decision in *Arguelles* was the fact that there was nothing in the language or legislative history of the LMRA to indicate an intent to abrogate the statutory right to sue in federal court afforded by the Seaman's Wage Act." "The Court's rationale was clear: the LMRA simply addressed restrictions on the activities of labor unions; since the history of the LMRA 'is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them.'").

In contrast, the Court subsequently held in the context of the Convention that:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

Thus, while the LMRA focuses upon domestic suits by labor unions against labor unions, the goal and focus of the Convention is to encourage the enforcement of arbitration provisions contained in "international contracts" and to unify the standards used throughout the world in observing agreements to arbitrate. To apply *Arguelles* and its discussion of the LMRA here would subvert the policy underlying the Convention because it would require the Court to legislate or create an exemption from the Convention and Convention Act for certain claims brought by seamen.

Grafting such exemptions onto the Convention is not permitted because "to read industry-specific exceptions into the broad language of the Convention Act would be to hinder the Convention's purpose." *See Bautista v. Star Cruises*, 396 F.3d 1289, 1299 (11th Cir. 2005) (citing *Scherk*, 417 U.S. at 520 n.15). Thus, while a parochial desire to protect seamen trumped the

underlying policy of the LMRA in *Arguelles*, "[i]n pursuing effective, unified arbitration standards, the Convention's framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their 'parochial' values into the regime." *See Bautista*, 396 F.3d at 1300; *see also Lobo*, 488 F.3d at 896 (quoting *Scherk*, 417 U.S. at 520 n.15) (implementation of the Convention is "'strongly persuasive evidence of congressional policy' in favor of uniform enforcement of arbitration agreements, despite the potential presence of parochial policies present in other parts of the U.S. Code").

More specifically:

> The delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.

See Scherk, 417 U.S. at 520 n.15; *see also Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 54 (3d Cir. 1983) ("In other words, signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate.").

There is no conflict between the Ninth Circuit's decision and *Arguelles*. Where, as here, all the elements of the Convention are satisfied, arbitration is mandatory and there is no basis for carving out claims brought under §10313. If any element of the Convention is *not* satisfied, then courts are not required to compel arbitration for a claim brought under §10313.

Finally, in an attempt to create intra-circuit conflict, Ms. Kar and Mr. Rogers argue that the Ninth Circuit's decision in this action conflicts with its earlier decision in *Larkins v. Hudson Waterways Corp.*, 640 F.2d 997, 999 (9th Cir. 1981). There is no conflict between these decisions because although the Convention was in effect in the United States at the time the Ninth Circuit issued its decision in *Larkins*, the Convention was not addressed in *Larkins* and the Ninth Circuit addressed only *Arguelles*. Thus, the Ninth Circuit's decision in this action does not conflict with *Larkins* for the same reason it does not conflict with *Arguelles*: neither *Larkins* nor *Arguelles* addresses the applicability of the Convention to claims brought under §10313.

There is no conflict between the Ninth Circuit's decision and a decision from another circuit or this Court. The Petition should be denied.

II. The Federal Arbitration Act's Exemption For Seamen Employment Contracts Does Not Apply To The Convention Act.

The Ninth Circuit joined the Fifth and Eleventh Circuits in holding that the exemption for seamen employment contracts (the "Exemption Clause") contained in §1 of the Federal Arbitration Act (the "FAA") (9 U.S.C. §1) does not apply to the Convention Act. *See Stolt*, 293 F.3d 270 (5th Cir. 2002); *Bautista*, 396 F3d 1289 (11th Cir. 2005). The Fifth, Ninth, and Eleventh Circuits are the only circuit courts to have considered this issue.

Despite the unanimity among the circuits, Ms. Kar and Mr. Rogers nonetheless offer two reasons they believe this issue should be considered by the Court. First, they argue that a portion of the dissenting opinion written by Judge Noonan illustrates why the Exemption Clause should apply to the Convention Act. Second, they argue that the Fifth, Ninth, and Eleventh Circuits simply got it wrong. Neither argument is legally correct, and neither provides a "compelling reason" for granting the Petition.

With respect to Ms. Kar's and Mr. Rogers's *first* argument, they hold out a portion of Judge Noonan's dissent in which he wrote that he did not believe the Convention should apply because Ms. Kar and Mr. Rogers did not stipulate that they saw, read, or understood the collective bargaining agreement containing the arbitration provision, or that their attention was drawn to the arbitration provision.

As a threshold issue, this portion of the dissent is of no use to Ms. Kar and Mr. Rogers because it does not address – or even purport to address – the Exemption Clause, and whether it applies to the Convention Act.

Regardless, although Judge Noonan raised this issue in his dissent, Ms. Kar and Mr. Rogers did not allege in their Verified First Amended Complaint that they did not read, see, or understand the CBA, and they never presented any evidence to the district court – not even their own affidavits – saying they did not read, see, or understand it. If Ms. Kar and Mr. Rogers wanted to avoid enforcement of the arbitration provision on the basis that they did not read, see, or understand the CBA, then it was their burden to raise such an argument before the district court and to introduce evidence supporting the argument. *See, e.g.*, *Lim*, 404 F.3d at 905-06 (quoting *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004)) ("'there is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity'"); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 91 (2000) (noting "prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"). They did not do so, however, thus the issue of whether they read, saw, or understood the CBA was not part of the record before the Ninth Circuit and forms no basis for granting the Petition.

Ms. Kar and Mr. Rogers also point to another portion of Judge Noonan's dissent, in which Judge Noonan wrote that under *Arguelles*, the Convention should not be used to require arbitration for claims

brought under §10313. Just like the other portion of the dissent they cited, this portion of the dissent does not help Ms. Kar and Mr. Rogers because it does not address the applicability of the Exemption Clause to the Convention Act.

Additionally, and as discussed above, *Arguelles* has no bearing upon the issues of whether the Convention applies to claims brought under §10313, and whether such claims can be carved out from the Convention. Judge Noonan did not cite any decisions – and there are none – in which all the elements of the Convention were satisfied, but a court held that the Convention did not apply to claims brought under §10313, or held that claims brought under §10313 can be exempted from the Convention, or declined to compel arbitration for a claim brought under §10313.

With respect to Ms. Kar's and Mr. Rogers's *second* argument, they contend the Ninth Circuit reached the wrong result. Even though the Ninth Circuit (like the Fifth and Eleventh Circuits before it) engaged in a comprehensive discussion regarding the inapplicability of the Exemption Clause to the Convention Act, Ms. Kar and Mr. Rogers make virtually no reference to the Ninth Circuit's reasoning and fail to explain why the Ninth Circuit's reasoning is supposedly incorrect.

Section 1 of the FAA defines "maritime transactions" and "commerce," and also contains a statement that nothing in the FAA applies to "contracts of employment of seamen," which latter statement is the Exemption Clause. Section 202 of the Convention Act provides that the Convention Act applies to agreements arising from relationships that are "considered as commercial,"

including, but not limited to, agreements described in §2 of the FAA. Section 2 of the FAA, in turn, describes provisions in contracts "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."

Ms. Kar and Mr. Rogers argue that the Exemption Clause is part of the definition of "commerce," which, according to them, means that seamen employment contracts are, by definition, not "commercial" or "considered as commercial," and do not "involv[e] commerce."

In its decision, the Ninth Circuit held that the Exemption Clause does not affect the definition of commerce contained in §1 of the FAA (Pet. App. 14-15). More specifically, the Ninth Circuit held that the Exemption Clause does not say that seamen and other transportation workers "are *not* engaged in commerce or that their employment contracts are not 'considered as commercial.'" (*Id.* at 14) (emphasis in original). "Instead, [the Exemption Clause] states that *even though* such workers are engaged in commerce and *even though* their employment contracts are considered as commercial, the FAA does not apply to them." (*Id.*) (emphasis in original). Put another way, the Exemption Clause does not define what is or is not defined as commerce or considered as commercial; it says only that the FAA does not apply to seamen employment contracts.

Ms. Kar and Mr. Rogers make no attempt to explain why the Ninth Circuit's reasoning is erroneous, and they cite no decisions suggesting the Ninth Circuit (or the Fifth and Eleventh Circuits) was wrong. They do cite

Florida Department of Revenue v. Piccadilly Cafeterias, Inc., __ U.S. __, 128 S.Ct. 2326, 2336 (2008), apparently for the proposition that the section heading of §1 has something to do with the effect of the Exemption Clause, but the section heading further proves the Ninth Circuit's point.

The section heading for §1 provides: "'Maritime transactions' and 'commerce' defined; exceptions to operation of title." That was exactly the Ninth Circuit's point: §1 contains a definition of "commerce," and – as shown by what appears after the semicolon in the section heading– §1 also contains an independent "exception to operation of title" (the Exemption Clause). That exception has nothing to do with the statutory definition of commerce, and says only that nothing in the FAA applies to seamen employment contracts.

The issue of the inapplicability of the Exemption Clause to the Convention Act does not present a "compelling reason" for granting the Petition, and the Petition should be denied.

III. The 1983 Amendment To 46 U.S.C. §597 Does Not Trump The Convention Nor Exempt From The Convention Claims Brought Under §10313.

Ms. Kar and Mr. Rogers argue that under the "last in time rule," amendments that were made in 1983 to the predecessor to §10313 trump the Convention, and the Ninth Circuit's decision ignores that those amendments have trumped the Convention. Ms. Kar and Ms. Rogers are wrong as a matter of law, and their argument does not provide a "compelling reason" for granting the Petition.

The predecessor to §10313(i) was 46 U.S.C. §597 which, in relevant part, provided "the courts of the United States shall be open to such seamen for its enforcement." In 1983, Congress amended portions of the Seaman's Wage Act and, in doing so, moved that portion of §597 into a new section, §10313(i), and changed the language to read (as it currently reads) "[t]he courts are available to the seaman for the enforcement of this section."

Thus, the 1983 amendment (a) moved a portion of §597 into a new section, §10313(i), (b) made state courts available to seamen, whereas only federal courts were available under §597, and (c) relaxed the "shall be open to such seamen" language of §597 to the "are available to the seaman" language found in §10313(i).

Ms. Kar and Mr. Rogers argue that this amendment – which occurred thirteen years after the Convention was implemented – trumps the Convention and exempts from the Convention claims brought under §10313. Their position is that Congress – wanting to make clear that the Convention does not apply to claims under §10313 – chose the 1983 amendment to §597 as the vehicle to exempt such claims from the Convention and, in order to make sure everyone was keenly aware of the exemption, decided to make the exemption clear by saying only "[t]he courts are available to the seaman for the enforcement of this section." This argument fails for at least two reasons.

First, the argument is premised upon the "last in time" rule, under which *if* there is a *conflict* between a

treaty and a later enacted statute, then the later enacted statute controls. Specficially,

> When [a statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the last one in date will control the other.

See Whitney v. Robertson, 124 U.S. 190, 194 (1888); *see also Haver v. Commissioner of Internal Revenue Service*, 444 F.3d 656, 658 (D.C. Cir. 2006) (quoting *Whitney*, 124 U.S. at 194) (same); *Ntakirutimana v. Reno*, 184 F.3d 419, 426-27 (5th Cir. 1999) ("if a statute and treaty are inconsistent, then the last in time will prevail"). If there is no conflict between a treaty and a statute, then the last in time rule never comes into play.

Here, there is no conflict between the Convention and §10313(i). If all the elements of the Convention are satisfied, then a claim under §10313 must be sent to arbitration. If, however, any one of the elements is not satisfied, then §10313(i) makes state and federal courts available to seamen to pursue claims under §10313. Ms. Kar's and Mr. Rogers's argument fails at the threshold because there simply is no conflict between the Convention and §10313(i), and effect can be given to both authorities quite easily.

Second, in order for the 1983 amendment to be treated as having modified, changed, or partially repealed the Convention so as to make the Convention inapplicable to claims under §10313, there must be a

clear expression of Congressional intent to that effect. *See, e.g., Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957) ("For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed."); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored" and "the intention of the legislature to repeal must be clear and manifest").

Here, there is absolutely nothing in the legislative history of the 1983 amendment – or in any other authority – clearly expressing an intent by Congress to make claims under §10313 exempt from the Convention. Indeed, and not surprisingly, Ms. Kar and Mr. Rogers have not cited to any such clear expression of Congressional intent. There is *only* the language of §10313(i) – "[t]he courts are available to the seaman for the enforcement of this section" – and nothing in that language expresses a clear intent by Congress to make the Convention inapplicable to claims under §10313.

The 1983 amendment does not trump or otherwise make the Convention inapplicable to claims under §10313. The Petition should be denied.

CONCLUSION

For these reasons, Ms. Kar's and Mr. Rogers's Petition should be denied.

Respectfully submitted,

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